SUPREME COURT, U.S.
FILED
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E. ROBERT SEAVER, CLERK

in the Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-899

JOSE MIGUEL GARCIA-GUILLERN,
Appellant-Petitioner,

vs.

UNITED STATES OF AMERICA,
Appellee-Respondent.

PETITION FOR WRIT OF CERTIORARI

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MIAMI REVIEW — 371-4853 — 377-3721

TABLE OF CONTENTS

	Page
OFFICIAL COMPLAINTS, ORDERS AND OPINIONS	2
JURISDICTIONAL GROUNDS	2
QUESTION PRESENTED FOR REVIEW	3, 4
PERTINENT TREATY PROVISIONS AND STATUTES	5
STATEMENT OF THE CASE	5
ARGUMENT	6
CERTIFICATE OF MAILING	14
APPENDICES A - H	

TABLE OF CITATIONS

Case	Page
Artukovic v. Boyle, 107 F.Supp. 11 (1952)	9
Cleugh v. Strakosch, 109 F.2d 330 (9th Cir. 1940)	9
Collins v. Miller, 252 U.S. 364, 40 Sup.Ct. 347 (1920)	9
In Re Ezeta, 62 Fed. 972 (N.D. Cal. 1894)	7
In Re Farez, Fed. Cas. No. 4,645 (C.C. R.I. 1870)	9
Fernandez v. Phillips, 268 U.S. 311, 45 S.Ct. 541, 69 L.Ed. 970 (1925)	6
In Re Frank, 107 F. 272 (D.C. Cir. 1901)	9
José Miguel Garcia-Guillern v. USA, [illegible] F.2d [illegible] (5th Cir. 1971)	2
Extradition of Clodoveo Ortiz Gonzalez, 217 F.Supp. 717 (1963)	9
Jaime J. Merino v. United States Marshal, [illegible] F.2d [illegible] (1963)	12
Muller's case, Fed. Cas. No. 9,913 (D.C. Pa. 1863)	9
Extradition of Mylonnas, 187 F.Supp. 716 (1960)	11

TABLE OF CITATIONS (cont.)

OTHERS

	Page
Florida Statute 932.05	4
Florida Statute 932.06	4
Title 18 U.S.C. 3282	3, 6
Treaty between Republic of Peru and United States:	
Article I	5
Article VI	6, 7
Article VII	3, 6, 7
Vol. 19, USS p. 32-USS 1044	8
29 Am. Jur. International Law, p. 286 (1935)	8

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PETITION FOR WRIT OF CERTIORARI

COMES NOW, the Petitioner, JOSE MIGUEL GARCIA-GUILLERN, by and through his undersigned attorney, the Law Office of Martin S. Saxon, and brings this his Petition for Writ of Certiorari emanating from an original request for extradition by the Peruvian Government to the United States of America: from a timely Petition for Writ of Habeas Corpus and Appeal to the Fifth Circuit Court of Appeals, New Orleans, Louisiana,

from an Order affirming said denial, and therefore, as grounds for said Petition for Writ of Certiorari states the following in accordance with Rules of the Supreme Court, Rule 23;

1. The official Complaint for Extradition filed October 6, 1970, Order and Warrant for Commitment filed January 11, 1971, Petition for Writ of Habeas Corpus filed January 14, 1971, Order of Dismissal of said Habeas Corpus filed March 9, 1971, and Notice of Appeal filed March 15, 1971, and Opinion affirming said Order of Dismissal, are set forth in the Appendix A through H.

2. Jurisdiction of this Honorable Court is invoked by the Petitioner hereby showing that an opinion was rendered by the Fifth Circuit Court of Appeals affirming the dismissal of the original petition for writ of habeas corpus. Said opinion was rendered on November 4, 1971, Case No. 71-1538, **Jose Miguel Garcia-Guillern v. United States of America,** ____ F.2d ____, (5th Cir. 1971). The Petition for Rehearing timely filed was denied and Order entered by the Fifth Circuit Court of Appeals on November 29, 1971, ____ F.2d ____, (5th Cir. 1971).

3. Your Petitioner submits that jurisdiction in this Honorable Court should be granted on the basis that an important question of Federal law, of significant international concern, should be ruled upon by this Honorable Court.

4. The question presented for review and which we submit is of national and international significance and importance is the following:

(a). In an International Extradition proceeding before a District Judge sitting as a Committing Magistrate, who applies the State laws as to the determination of probable cause and competency of evidence, is the Statute of Limitations to be applied in accordance with the Treaty, Federal Statute 18 U.S.C. 3282, or the Statute of Limitations of the state in which the complaint was filed and proceeding held?

5. The Treaty of Extradition between the United States of America and the Republic of Peru executed on November 28, 1899, Article VII, reads as follows:

> **"The extradition will not be granted** in virtue of this Treaty if the legal proceedings, or the application of the law for the crime committed has prescribed **according to the laws of the country receiving the petition."** (Emphasis added).

Title 18, U.S.C. 3282, reads as follows:

> "3282. Offenses not capital.—Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed. (June 25, 1948, c. 645, §1, 62 Stat. 828; Sept. 1, 1954, c. 1214, §12(a) [10(a)], 68 Stat. 1145; Sept. 26, 1961, P L 87-299, §1, 75 Stat. 648)"

Florida Statutes 932.05 and 932.06, read as follows:

"932.05 Limitation of prosecutions — All offenses not punishable with death, save as hereinafter provided, shall be prosecuted within two years after the same shall have been committed. There shall be no limitation for offenses punishable with death. In all offenses not punishable with death where an indictment has been found or an information filed within two years after the commission of the offense and such indictment or information, because of any defect, omission or insufficiency in the contents or form thereof, is subsequently quashed or set aside after said two year period has elapsed, in that event further indictments may be found or informations filed for such offense within three months after the entry of the order of the court quashing or setting aside the indictment or information, and prosecution thereunder shall proceed as if the same were commenced within two years after the commission of the offense."

"932.06 Same: state, county and municipal officials — All offenses by state, county or municipal officials, committed during their term or terms of office, in any way whatsoever connected with the discharge of the duties of their different offices, shall be prosecuted within two years after the said officer shall retire from such office."

6. **Statement of the Case** — Your Petitioner resided in the United States of America from 1956 to 1963 in a position as Senior Accountant, Financial Division, of the International Bank of Reconstruction and Development in Washington, D.C., and returned to Peru at the request of the then President, Belounde. Your Petitioner held the post of Director General of Education, Ministry of Education, while in Peru from 1963 to his date of retirement from the government service on October 3, 1967. Your Petitioner became a resident of the State of Florida in the summer of 1968. He temporarily returned to Peru before permanently returning to the United States of America on November 13, 1968. Petitioner was married, gainfully employed, purchased a modest home, and had his first child April 3, 1969, his second child on April 15, 1970, all in the City of Miami, State of Florida. On July 30, 1970, Petitioner obtained his permanent resident status as an immigrant eligible for citizenship in the United States, prior to the extradition charges being filed in October of 1970.

Petitioner testified, said testimony not being rebutted, that at all times the Peruvian Consulate in Miami knew of his whereabouts in Miami, Florida. The documentary evidence submitted by the Peruvian Government during these proceedings revealed that on May 20, 1969, Interpol officially advised the Government of Peru of Petitioner's specific address in Miami, Florida. Petitioner submits that it is further documented that criminal proceedings in Peru were not requested or instituted before October 15, 1969. Pursuant thereto, a Complaint for Extradition was filed on October 6, 1970. The extradition proceedings heretofore noted took place pursuant to the Complaint filed on October 6, 1970.

7. **Argument** — Both the Habeas Corpus Judge's Order on March 9, 1971, and the Fifth Circuit Court of Appeals decision rendered on November 4, 1971, held the Petitioner's argument was not reviewable as a jurisdictional question under the accepted law in the case of **Fernandez v. Phillips**, 268 U.S. 311, 45 S.Ct. 541, 69 L.Ed. 970 (1925). However, both decisions set forth that irregardless of this fact, the applicable period of limitations would be the Federal five-year Statute of Limitations in accordance with 18 U.S.C. §3282.

It is Petitioner's contention as set forth in the original Habeas Corpus proceeding and the subsequent appeal, that the application of an appropriate Statute of Limitations is clearly and legally a jurisdictional question thus reviewable on Habeas Corpus and by the Fifth Circuit Court of Appeals.

It must, therefore, be emphasized that Article VII of the Treaty between Peru and the United States of America reads that:

> "The extradition will not be granted in virtue of this Treaty . . ."

We thus submit that Article VII by its language is an exemptive provision which implies that the Treaty is not applicable where the charged crime has prescribed. Accordingly, once the determination is made, the extradition magistrate under the provisions of the Treaty is without jurisdiction to enter an order of commitment and certification to the Secretary of State. In comparison we point out Article VI dealing with the political crime aspect which reads:

> "The fugitive will not be delivered if the imputed crime is a political one, or . . . the final decision belongs to the government who has received the petition of extradition, or has granted it."

The distinction between Article VII and Article VI is readily perceptible. In Article VII it is clearly stated that where determination that a claim to extradite for a crime which has prescribed, the "extradition will not be granted." On the other hand, Article VI provides only that he will not be delivered and thus does not affect the jurisdiction of the magistrate so as to terminate the hearing as does Article VII. The Court in **In Re Ezeta**, 62 Fed. 972 (N.D. Cal. 1894), considered this distinction in arriving at the conclusion that the matter was jurisdictional as to the magistrate by virtue of the specific terms of the Treaty. At page 997, the Court stated that:

> "In this case the prohibition is not that there shall be no surrender, but that 'the provisions of this treaty shall not apply to any crime or offense of a political character.' The prohibition extends to the action of the committing magistrate, and terminates his jurisdiction when the political character of the crime or offense is established. In other words, he has no authority to certify such a case to the executive department for any action whatever. This view of the law does not in any way conflict with my decision upon the plea to the jurisdiction where the political questions there suggested were outside the merits of the case, and had no relation to the criminality of the accused."

Could it be considered that the makers of the Treaty between Peru and the United States intended the federal statute of limitation to be thereafter invoked in complete exclusion and in deference to the individual state statute in which the extradition would by necessity be brought?

At the time the Treaty was entered into between Peru and the United States, November 28, 1899, the United States had in existence a prescription statute for non-capital crimes of three years. Vol. 19, USS p. 32 USS 1044, April 13, 1876. Thus the Treaty itself could easily have specifically stated that either the federal law or law of the country to which the extradition would be requested would apply. However, the words "laws of the country" were explicitly used in the Peruvian Treaty as they were in numerous treaties entered into prior to 1899.

In 29 Am. Jur., International Law p. 286 (1935), this proposition was discussed and analyzed.

> "If it be admitted that the act charged must have been made criminal by the law of the requested state, it would seem to be important, on general principles apart from their application in particular treaties, that this should be the law prevailing in that part of the territories of the requested state in which the accused has taken refuge and has been apprehended."

> "It is also significant that provisions for immunity under statutes of limitations are referred, by some of the treaties of the United States, to the laws of the requested state, which in the United States will generally be the law of the

> place of asylum. If the surrender of a person in Illinois is sought by Canada, it would seem according to general principles that in the application of the principle of double criminality, the Illinois law should control regardless of the law in other states of the Union."

Under Article I the wording:

> "... provided that there exist criminality according to the laws of the country where the fugitive or the accused is sheltered, which could justify his arrest and trial in case that the crime or offense had been committed in that country,"

implies that the particular local state law in which the extradition takes place is absolutely controlling to determine the particular criminal elements, the criminal procedure, and the competency of the evidence. **Extradition of Clodoveo Ortiz Gonzalez**, 217 F.Supp. 717 (1963); **Collins v. Miller**, 252 U.S. 364, 40 Sup. Ct. 347 (1920); **In Re Farez**, Fed. Cas. No. 4, 645 (C.C. 4th 1870); **Muller's case**, Fed. Cas. No. 9, 913 (D.C. Pa. 1863); **In Re Frank**, 107 F.272 (D.C. Cr. 1901); **U.S. ex rel. Caputo v. Kelly**, 19 F.Supp. 730 (S.D.N.Y. 1937); **Cleugh v. Strakosch**, 109 F.2d 330 (9th Cir. 1940); **Artukovic v. Boyle**, 107 F.Supp. 11 (1952).

Why then if "laws of the country" as set forth in Article I has been clearly interpreted as invoking the law of the state in which the action is brought is not "laws of the country" as set forth in Article VII, equally interpreted to invoke the state of limitations of the state? We know of no justifiable rationale to conclude that the fed-

eral statute should be applied without exception and in preference and without consideration of the individual state.

In 1935, growing out of a worldwide international league of nations law seminar, an extensive concise legal presentation was written and published in the Supplement of Volume 29 American Journal of International Law. It was entitled "Research in International Law," under the auspices of the faculty of the Harvard Law School. The chairman of the committee was Charles Burdick, then Dean of Cornell Law School, and was comprised of some forty-eight deans, judges, state officials, professors, and distinquished members of the legal profession, four of whom being: George A. Finch, of Washington, D.C., of the American Journal of International Law, formerly Assistant United States Legal Advisor; Green H. Hackworth, Legal Advisor, Department of State; Judge Learned Hand, former Judge of the United States Circuit Court, Second Circuit; and George Wickershaw, former President of American Law Institute and former Attorney General of the United States.

In Article 4 of their presentation, contained in 29 Am. Jur. International Law Supplement, starting on Page 99, through Page 107, is stated the following in support of Petitioner's argument:

"Article 4. Lapse of Time.

A requested State may decline to extradite a person claimed if under the law of the requesting State such person, at the time when the requisition is received, has become immune from pros-

> ecution or punishment by reason of the lapse of time, or if under the law prevailing in that part of the territory of the requested State in which the person is apprehended such person, at the time when the requisition is received, would have become immune from prosecution or punishment by reason of the lapse of time, if the act had been committed within the territory of the requested State."

To further support by legal authority Petitioner's position concerning the statute of limitations, we cite the following two important cases.

In the matter of the extradition of **Mylonnas**, 187 F.Supp. 716 (1960), the District Court sitting as a committing magistrate, Northern District of Alabama, held that where the location of the accused who had been charged with the crime of embezzlement as had Petitioner was known to the extraditing country of Greece after he had entered the United States and their subsequent delay of more than three years from the initiation of prosecution in Greece before seeking extradition, did not afford Petitioner a speedy trial, extradition therefore, would be denied under the treaty provision similar to that which we deal with here.

The Defendant, Mylonnas in that case relied upon the fact that under Article V of the Treaty between the United States and Greece due to the "lapse of time or other lawful cause" he was exempt from prosecution and had been deprived of a prompt and speedy trial both under the Alabama State Constitution and under the Sixth Amendment to the Federal Constitution of the

United States. It may be noted that on page 721 the Honorable Judge Grooms considering Article V of the Treaty, stated that "this article would apply to any applicable statute of limitations . . ." He then, under Note No. 12, page 721, set forth the applicable Alabama Code of 1940 which applied their three-year Statute of Limitations to said alleged offense. He went on to state:

> "In this age of rapid communication and transportation there is little or no justification for waiting more than three years from the initiation of a prosecution before taking steps to apprehend the accused, when, at all times intervening, his whereabouts was fully known to the prosecuting authorities of Greece . . . So considering the case, I am of the opinion that the accused has not been afforded a speedy trial, and that extradition should be denied on that grounds, whether the failure to act be said to fall within the exemption due to "lapse of time", or whether due to "other lawful cause."

In the case of **Jaime J. Merino v. United States Marshal**, 326 F.2d 5 (1963), the United States Court of Appeals, Ninth Circuit, considered an extradition complaint from Mexico charging similar crimes to our case in point, and the Defendant, Merino, attempted to set up the bar of the statute of limitations. The Mexican Extradition Treaty provision in question, states:

> ". . . according to the laws of the country to which the requisition is addressed",

said words being similar in implication to Article VII of the Treaty between Peru and the United States. In considering the application of the appropriate statute of limitations, Judge Jertberg stated:

> "That Section 799 of the Penal Code of California provides there is no time within which prosecution for the embezzlement of public monies and falsification of public records must be commenced and such prosecution may be commenced at any time after the discovery of the crime."

Thus Judge Jertberg held in the Merino case that there was no bar by the California statute of limitations. It must be noted that Judge Jertberg took note of the Federal Statute of Limitations under 18 U.S.C. Section 3282, however we submit that the Court in other issues of the Merino case applied the "state law, California law," to test the sufficiency of evidence as applied to the alleged offenses, therefore, we submit it is apparent that if California had an applicable statute of limitations it would have controlled and thus barred the extradition.

WHEREFORE, we pray that this Honorable Court grant this most gracious Writ of Certiorari.

LAW OFFICE OF MARTIN S. SAXON
Attorney for Petitioner
17-G, 1400 N. W. 10th Avenue
Miami, Florida 33136
305 379-3811

By: _____
LOUIS STOSKOPF, *Of Counsel*

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to the Clerk of the Fifth Circuit Court of Appeals, Room 408, 400 Royal Street, New Orleans, Louisiana, 70130, Mr. Murray R. Stein, Attorney, Department of Justice, Washington, D.C., 20530, and the Clerk of the United States District Court, Southern District of Florida; U. S. Post Office Building, 300 N. E. 1st Avenue, Miami, Florida, 33101, this ____ day of December, 1971.

That, through the diplomatic channel, your complainant is informed and believes that requisition for the hereinnamed fugitive, JOSE MIGUEL GARCIA-GUILLERN, also known as Jose Miguel Garcia-Guillerns, also known as Jose Miguel Garcia-Guillen, is about to be made, accompanied by the formal papers upon which demand for extradition is founded:

Whereupon, your petitioner, acting under the authority and in the behalf stated, prays the consideration of this petition and that a warrant may issue for the arrest of the said JOSE MIGUEL GARCIA-GUILLERN, also known as Jose Miguel Garcia-Guillerns, also known as Jose Miguel Garcia-Guillen, charged as aforesaid, that he may be brought before this Court, to the end that evidence of criminality may be heard, and, if on such hearing, the Court deems the evidence sufficient to sustain the charge under the provisions of said treaty, your complainant prays that this Court certify the same to the Secretary of State, at Washington, D. C., in order that warrant may issue upon the requisition of the proper authority of said foreign government for the surrender of the said JOSE MIGUEL GARCIA-GUILLERN, also known as Jose Miguel Garcia-Guillerns, also known as Jose Miguel Garcia-Guillen, according to the stipulations of said treaty, and for such other action as this Court is required under the provisions of said treaty and the laws of the United States to take.

DATED at Miami, Florida, this 6 day of October, 1970.

(Signed) ROBERT W. RUST
ROBERT W. RUST
UNITED STATES
ATTORNEY

STATE OF FLORIDA)
) ss.
COUNTY OF DADE)

BEFORE ME, the undersigned Notary Public for the State of Florida at Large, personally appeared the complainant, ROBERT W. RUST, the attorney of the United States for the Southern District of Florida, on the 6 day of October, 1970, who being duly sworn, says that the foregoing information is true, as he verily believes.

(Signed) MARY C. VAN SLEEN
NOTARY PUBLIC, STATE
OF FLORIDA AT LARGE
SEPT. 27, 1971
MY COMMISSION EXPIRES

(SEAL)

APPENDIX B

(Number and Title Omitted)

Filed: Jan. 11, 1971

ORDER AND WARRANT FOR COMMITMENT

THIS CAUSE came on for final hearing upon the government's complaint for extradition. The Court has reviewed the evidence presented and argument of counsel, and makes the following findings:

1. There is a treaty in existence between the United States of America and the Republic of Peru, proclaimed January 29, 1901, 31 Stat. 1921, which provides extradition shall be granted for "Embezzlement by public officers; embezzlement by persons hired or salaried, to the detriment of their employers; larceny, provided that the value of the property or the amount of money so embezzled or stolen is not less than $200 or 420 soles."

2. JOSE MIGUEL GARCIA-GUILLERN is presently charged in the Republic of Peru with the crime of embezzlement by a public official which is one of the crimes within the provision of the above-quoted article.

3. The evidence presented at the hearing convinces the Court that there is probable cause to conclude that JOSE MIGUEL GARCIA-GUILLERN has committed the crime of embezzlement by a public official under the laws of the Republic of Peru and the United States of America.

THEREFORE, THIS Court hereby certifies that the evidence is sufficient to sustain the charge under the aforementioned treaty and the Clerk of this Court is directed to submit the record herein together with a copy of all of the testimony to the Secretary of State.

IT IS ORDERED and ADJUDGED that JOSE MIGUEL GARCIA-GUILLERN is hereby committed to the custody of the Attorney General of the United States of America or his duly authorized representative and to remain until such time as he is surrendered to the proper Peruvian authorities.

DONE and ORDERED at Miami, Florida, this 11th day of January, 1971.

(Signed) C. CLYDE ATKINS
UNITED STATES
DISTRICT JUDGE

APPENDIX C

(Number and Title Omitted)

Filed: Jan. 14, 1971

PETITION FOR WRIT OF HABEAS CORPUS WITH CERTIORARI

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

TO THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA.

The Petition of MARTIN S. SAXON as attorney for Defendant, JOSE MIGUEL GARCIA-GUILLERN, respectfully shows:

He is the Attorney for JOSE MIGUEL GARCIA-GUILLERN and JOSE MIGUEL GARCIA-GUILLERN is not committed or detained by virtue of any final process, mandate, or final judgment or decree of a competent tribunal of criminal jurisdiction nor by virtue of an execution order or other process issued by the Secretary of State pursuant to our Extradition Treaty with Peru. That according to the best of knowledge and belief of your Petitioner, JOSE MIGUEL GARCIA-GUILLERN is confined in the City of Miami Jail upon a commitment signed by the Honorable Judge Atkins sitting as Committing Magistrate for the Southern District of Florida. The Commitment is predicated upon the charge that JOSE MIGUEL GARCIA-GUILLERN is a fugitive from justice from the

Republic of Peru and he is illegally confined upon such charge. The warrant of commitment is based upon irregular and illegal proceedings in that:

1. There is no proof that Defendant ever fled from Peru and is a fugitive from justice thereof, but on the contrary proof conclusively shows that Defendant is not a fugitive from justice.

2. That the crime for which he is charged and which he is alleged to have committed is not extraditable under the terms of the Treaty between Peru and the United States, nor is the crime alleged or charged a crime within the meaning of the Treaty.

3. That further grounds upon which Petitioner seeks this Writ are set forth and more specifically set out on Page 3, Paragraph 9, of the attached Petition for Writ of Habeas Corpus in compliance with the local rules and are incorporated herein by reference thereto.

4. That Defendant has been confined in contravention of Section 3188 of Title 18, United States Code. The aforesaid Magistrate has improperly and without due regard to the law and the facts certified to the Secretary of State that there is a reasonable ground to extradite JOSE MIGUEL GARCIA-GUILLERN.

WHEREFORE.

5. Your Petitioner prays that a Writ of Habeas Corpus should issue out of this court to the U. S. Marshall for the Southern District of Florida commanding him to

produce the body of Petitioner before this court on _____, together with the cause of his imprisonment and detention.

6. That a Writ of Certiorari should issue to the Honorable Judge Atkins sitting as Committing Magistrate for the Southern District of Florida commanding him to certify to said indictment and all proceedings had before him and return and/or assign these extradition proceedings and all orders, papers, briefs, and testimony of any nature had or used before him at such time and place as this Honorable Court may decree.

7. That there be issued a Stay Order retaining the records within the jurisdiction of this Court pending the hearing on the Petition for Writ of Habeas Corpus.

8. That this Honorable Judge consider Petitioner's Motion for Bond pending the determination of this Petition for Habeas Corpus along with the request for an emergency hearing thereof.

(Signed) MARTIN S. SAXON
MARTIN S. SAXON,
Petitioner

STATE OF FLORIDA
COUNTY OF DADE

MARTIN S. SAXON, being first sworn under oath, presents, that he has subscribed to the foregoing Petition and does state that the information therein is true and correct to the best of his knowledge and belief.

(Signed) MARTIN S. SAXON
AFFIANT

SWORN TO and subscribed before me this 13th day of January, 1971, at Miami, Dade County, Florida.

(Signed) MARLENE SCARNECCHIA
NOTARY PUBLIC

(SEAL)

APPENDIX

APPENDIX

APPENDIX A

(Number and Title Omitted)

Filed: Oct. 6, 1970

COMPLAINT FOR EXTRADITION

In the Southern District of Florida.

In the matter of the extradition of JOSE MIGUEL GARCIA-GUILLERN, also known as Jose Miguel Garcia-Guillerns, also known as Jose Miguel Garcia-Guillen, a fugitive from the justice of the Republic of Peru.

The honorable The Judge of the United States District Court in and for the Southern District of Florida.

Your complainant, the attorney of the United States for the Southern District of Florida, under oath, deposes and says:

That, in the above matter, he acts for and in behalf of the Government of the Republic of Peru;

That he is informed, through diplomatic channels, that the said JOSE MIGUEL GARCIA-GUILLERN, also known as Jose Miguel Garcia-Guillerns, also known as Jose Miguel Garcia-Guillen, is duly and legally charged with having committed the crime of embezzlement in the said Republic of Peru;

That the said JOSE MIGUEL GARCIA-GUILLERN, also known as Jose Miguel Garcia-Guillerns, also known

as Jose Miguel Garcia-Guillen, has fled outside the boundaries of the said Republic of Peru; that warrant for the arrest of the said JOSE MIGUEL GARCIA-GUILLERN, also known as Jose Miguel Garcia-Guillerns, also known as Jose Migtiel Garcia-Guillen, cannot be served in said Republic of Peru; and that the said JOSE MIGUEL GARCIA-GUILLERN, also known as Jose Miguel Garcia-Guillerns, also known as Jose Miguel Garcia-Guillen, has sought an asylum within the jurisdiction of the United States and may be found in the State of Florida and the city of Miami Beach, at 191 North Coconut Lane, Palm Island;

That the said crime of embezzlement, which the said JOSE MIGUEL GARCIA-GUILLERN, also known as Jose Miguel Garcia-Guillerns, also known as Jose Miguel Garcia-Guillen, is charged to have committed in said foreign country is among the offenses enumerated in the treaty existing between the United States and the said Republic of Peru, proclaimed January 29, 1901, 31 Statutes at Large 1921;

That said crime of embezzlement is more particularly referred to in Article II, Paragraph 6 of said treaty as follows:

> ARTICLE II — EXTRADITION SHALL BE GRANTED FOR THE FOLLOWING CRIMES AND OFFENSES:
>
> Paragraph 6: Embezzlement by public officers; embezzlement by persons hired or salaried, to the detriment of their employers; larceny, provided that the value of the property or the amount of money so embezzled or stolen is not less than $200 or 420 soles.

APPENDIX D

(Number and Title Omitted)

Filed: Mar. 9, 1971

ORDER OF DISMISSAL

THIS CAUSE is before the Court on a Petition for Writ of Habeas Corpus, the response thereto, and the supplemental pleadings filed by the parties. A hearing was held at which documents were introduced into evidence, testimony was taken and argument of counsel was heard.

This Petition follows an international extradition proceeding. A Complaint for Extradition was filed by the United States of America on behalf of the Government of the Republic of Peru. After a full hearing pursuant to 18 U.S.C. § 3184, the Court issued an Order and warrant for Commitment directing that Jose Miguel Garcia Guillern (hereinafter Petitioner) be committed to the custody of the Attorney General to remain until surrendered to the proper Peruvian authorities. In its Order and Warrant for Commitment the Court found that there is a treaty in existence between the United States of America and Peru, proclaimed January 29, 1901 (31 Stat. 1921) which provides that extradition shall be granted for embezzlement by public officers; that Petitioner is presently charged in Peru with the crime of embezzlement by a public official and that the evidence presented at the hearing indicates that there is probable cause to conclude that Petitioner committed the crime of embezzlement by a public official.

It is settled that in cases such as this a Petition for Habeas Corpus is not a means for rehearing what the committing court already has decided. The Petition is available only to inquire whether the committing court had jurisdiction, whether the offense charged is within the treaty, and whether there was any competent evidence warranting the finding of probable cause. Fernandez v. Phillips, 268 U.S. 311, 45 S.Ct. 541, 69 L.Ed. 970 (1925); Jimenez v. Aristequieta, 311 F.2d 547 (5th Cir. 1962). Therefore, Petitioner's contention that his extradition is barred by the Florida two-year statute of limitations (F.S. 932.05 and 932.06) is not here appropriate. Even if such contention were appropriate, it would not present grounds for relief because the applicable period of limitation in this case is five years. 18 U.S.C. 3282.

This Court finds that the committing court had jurisdiction and that there is competent evidence warranting the committing court's probable cause finding.

Petitioner contends that the offense charged is not within the treaty for two reasons. His first reason is that he is in effect being charged with a political crime contrary to Article VI of the treaty which provides: "A fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded be of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for an offense of a political character." His second reason is that he has not been "charged" with a crime within the meaning of the treaty.

Petitioner concedes that the crime of embezzlement by public officers is not a political crime. He argues that

the motive for the embezzlement charge is political and that after he is surrendered, Peru will prosecute him for crimes other than embezzlement, to wit: political crimes. There is evidence supporting Petitioner's contention and the embezzlement charge may be a pretext for reaching Petitioner on a non-extraditable charge. However, this argument may not be considered by the Court: It is not the Court's function to exercise discretion as to whether a criminal charge is merely a subterfuge for political reprisal. Whether the charge is made in good faith must be left to the Department of State. As stated by Circuit Judge Alschuler in Laubenheimer v. Factor, 61 F.2d 626, 628 (7th Cir. 1932): "It would indeed be incongruous, and tend toward incalculable mischief and complication, to accord to the various courts of the land power to inquire into and to pass upon the motives and conduct of foreign countries in their treaty relations with this country — a function peculiarly within the province of the state department of our government, and indeed made so by statute. 18 U.S.C. §§ 651, 653, 654." (now 18 U.S.C. §§ 3184, 3186, 3188); In re Lincoln, 228 Fed. 70 (E.D. N.Y. 1915); In re Gonzalez, 217 F.Supp. 717 (S.D. N.Y. 1963). Moreover, the treaty provisions in Article VI make it clear that it is for the State Department to determine whether to surrender or not surrender a person who contends that his extradition is motivated by a desire for political reprisal.

Petitioner contends that he has not been "charged" with a crime within the meaning of the treaty because the Peruvian criminal process develops in two stages and Petitioner's case has not yet proceeded beyond the first stage. There is no merit to this contention. At the hearing before the committing court there was testimony to the effect that Petitioner had been charged. A provisional

arrest warrant has been issued requiring the appearance of the Petitioner before a Peruvian court. In addition, the Supreme Court of the Republic of Peru has declared the Petitioner's extradition lawful. Therefore, it is

ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed.

DONE AND ORDERED at Miami, Southern District of Florida, this 9th day of March, 1971.

(Signed) JOE EATON
United States District Judge

cc: United States Attorney
Martin S. Saxon, Esquire

APPENDIX E

United States District Court
Southern District of Florida

No. 71-52-Civ-JE

Jose Miguel Garcia-Guillern,

Petitioner,

versus

United States of America, et al.,

Respondents.

Filed: Mar. 15, 1971

NOTICE OF APPEAL

COMES NOW, the Petitioner, the Defendant in the Lower Extradition Hearing, JOSE MIGUEL GARCIA-GUILLERN, by and through his undersigned attorney, and takes and enters this Appeal to the United States Court of Appeals, Fifth Circuit, to review an Order of Dismissal of a Habeas Corpus proceeding by the Honorable Judge Joe Eaton on March 9, 1971.

DATED this 15th day of March, 1971.

LAW OFFICE OF MARTIN S. SAXON
Attorney for Petitioner-Defendant
1400 N. W. 10th Avenue
Miami, Florida, 33125

(Signed) LOUIS STOSKOPF
LOUIS STOSKOPF, Of Counsel

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1538

JOSE MIGUEL GARCIA-GUILLERN,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

(November 4, 1971)

Before WISDOM, COLEMAN, and SIMPSON, Circuit Judges.

COLEMAN, Circuit Judge: Jose Miguel Garcia-Guillern appeals from an order of the District Court dismissing his petition for the writ of habeas corpus. The judgment of the District Court is affirmed.

I

The present habeas corpus proceedings are the second stage of legal efforts of the appellant to avoid extradition to Peru. The first stage may be described as follows. On October 6, 1970, in the appropriate District Court of the United States, Peru filed its complaint in extradition.

seeking the return of Garcia-Guillern, a former Director General of the Ministry of Education in that Country, he being at the time a resident of Miami Beach, Florida, and there being a treaty on the subject between the United States and Peru proclaimed January 20, 1901 (31 Stat. 1921). The complaint averred that the appellant had been duly charged in Peru with the crime of embezzlement.

After a full hearing, 18 U.S.C., §3184, the District Court issued an order and warrant for commitment, directing that the appellant be committed to the custody of the Attorney General of the United States to await the issuance of a warrant by the Secretary of State, authorizing his surrender to the Republic of Peru. In this order and warrant for commitment, the lower court found that there is a treaty in existence between the United States and the Republic of Peru providing that extradition shall be granted for embezzlement by public officers, that appellant is presently charged in Peru with that crime, and that the evidence presented at the hearing indicates that there is probable cause to conclude that the appellant committed that crime.

Before any action on these findings could be taken by the Secretary of State, the appellant renewed the litigation by filing his petition for the writ of habeas corpus in the District Court for the Southern District of Florida.

The District Court responded to this second stage of Garcia-Guillern's efforts to avoid extradition by finding that the committing court had jurisdiction, that there is competent evidence warranting the finding of probable cause, and that the appellant is presently charged in Peru with the crime of embezzlement by a public officer.

After notice of appeal was filed, the Secretary of State found that the appellant was extraditable and issued a surrender warrant. Appellant, however, filed a motion for and obtained a stay pending appeal to this Court (one judge dissenting).

It is now argued that the District Court erred in not discharging appellant from custody because: (1) by virtue of Article VII of the Treaty of Extradition between Peru and the United States of America and committing court was without jurisdiction, as the crime of embezzlement as charged had prescribed, (2) the proceedings should have been remanded to the committing court for consideration and determination of whether the claim of extradition was for any crime or offense of political nature or related thereto pursuant to Article VI of the treaty, (3) the decision of the committing court was not based on legal, competent and adequate evidence upon which the elements of the crime of embezzlement must have been legally established, (4) appellant would be charged and tried in Peru for other crimes wholly distinct and unrelated to the crime of embezzlement as set forth and charged in the original extradition complaint, and (5) the evidence did not warrant the conclusion that the appellant was ever properly or legally charged with the alleged crime in accordance with the extradition treaty. He asks us to annul the surrender warrant issued by the State Department and to discharge him from the extradition proceeding.

Habeas corpus review of the findings of a court which conducted an extradition hearing is extremely limited. Under existing law, such review includes only (1) whether

the magistrate had jurisdiction, (2) whether the evidence showed a reasonable ground to believe the accused guilty, and (3) whether the offense charged was within the treaty. See, Fernandez v. Phillips, 268 U.S. 311, 45 S.Ct. 541, 69 L.Ed. 970 (1925); Jiminez v. Aristeguieta, 5 Cir., 1962, 311 F.2d 547; Wacker v. Bisson, 5 Cir., 1965, 348 F.2d 602.

Appellant does not contend that the District Court which ordered his commitment was not authorized to conduct an extradition hearing. Nor does he contend that the said court lacked jurisdiction over his person. Hence, there is no question as to the jurisdiction of the committing court: Gallina v. Fraser, 177 F.Supp. 856 (D. Conn, 1959), affirmed 2 Cir, 1960, 278 F.2d 277, cert. denied 364 U.S. 851, 81 S.Ct. 97 (1960).

The existence of probable cause or, in other words, the existence of a reasonable ground to believe the accused guilty of the crime charged is essential to the issuance of a commitment. Appellant contends that the evidence submitted to the committing court was not sufficient to establish such probable cause and as a result the offense with which he is charged cannot be certified as "extraditable". In Re Gonzalez, 217 F.Supp. 717 (S.D. N.Y., 1963). We see, however, that the competent evidence of a criminal violation is sufficient to have justified appellant's apprehension and commitment for trial. The function on habeas corpus is to determine whether there is any competent evidence tending to show probable cause. The weight and sufficiency of that evidence is for the determination of the committing court. Merino v. United States Marshal, 9 Cir., 1963, 326 F.2d 5.

Though not stated in so many words, appellant contends that the offense with which he is charged is not within the treaty, because he is, in effect, being charged with a political offense, which is not extraditable under the terms of the treaty. A political offense, under the extradition treaties, must involve an "uprising" or some other violent political disturbance. Moreover, the act in question must have been incidental to the occurrence in order to justify the exclusion, In Re Gonzalez, supra, 217 F.Supp. at 721. The status of the offense committed, whether a political offense or not, is to be determined by the circumstances attending the alleged crime at the time of its commission and not by the motives of those who subsequently handle the prosecution, Ramos v. Diaz, 179 F.Supp. 459 (S.D. Fla., 1959).

No evidence was placed in the record showing that the offense with which appellant stands charged was committed in the course of or incidental to an "uprising" or some other violent political disturbance. Therefore, the political offense exclusion as set forth by Article VI of the treaty in question cannot be applied to this case.

With respect to appellant's contention that upon his return to Peru he will be charged with, and tried for, other crimes distinct and unrelated to the offense with which he is now charged, we are not at liberty to speculate that the Republic of Peru will not recognize and live up to the obligations subsisting between it and the United States. Neither are we permitted to inquire into the procedure which awaits the appellant upon his return. Gallina v. Fraser, supra, 177 F.Supp. at 867, 278 F.2d at 78. Such matters, so far as they may be pertinent, are

left to the State Department, which ultimately will determine whether the appellant will be surrendered to the Peruvian Government.

Because of the limits upon review by habeas corpus of a finding of international extraditability, none of the other contentions of the appellant are discussed in the disposition of this appeal. A writ of habeas corpus cannot

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[1] Appellant contends that Article VII of the treaty requires that the law of the State of Florida be applied in determining whether the crime has prescribed. Article VII reads as follows:

> The extradition will not be granted in virtue of this treaty if the legal proceedings, or the application of the law for the crime committed has prescribed according to the laws of the country invoking the petition.

The District Court found that appellant's contention was not appropriate for consideration in a habeas corpus proceeding and that even if such contention were so appropriate, it would not present grounds for relief because the applicable period of limitation in this case is five years, 18 U.S.C. § 3282. A treaty is an agreement between two nations and the statutes of limitations of the various states of the United States should not be used to interfere with obligations under a treaty if the crime has not prescribed according to the federal statute of limitations. Especially so, if the meaning of the language used in the treaty is as clear as it seems to be here. The appellant offers no cases in support of his position and only cites us to an article written in 1935 which, if read closely, lends him no support.

Appellant's contention that he has never been properly or legally charged with a crime in accordance with the treaty is also not appropriate for consideration. A petition for the writ of habeas corpus is not to be used as a means for rehearing what a committing court has already decided. In any event there is no merit to his contention. At the hearing before the committing court there was testimony to the effect that appellant had been charged with a crime. A provisional arrest warrant had been issued requiring the appearance of the appellant before a Peruvian Court and in addition, the Supreme Court of Peru has declared that the extradition of the appellant is lawful.

Assuming *arguendo*, that review by habeas corpus of these two points of error is appropriate, they do not furnish this Court with any basis for a reversal of the order entered by the District Court dismissing the petition for writ of habeas corpus.

be used to hear for a second time the findings of the court which conducted the initial hearing. As has been said very often, habeas corpus cannot take the place of a writ of error, Fernandez v. Phillips, supra, 268 U.S. at 312.

The petition for an order vacating and voiding the surrender warrant is denied. The order of the District Court dismissing the petition for the writ of habeas corpus is

AFFIRMED.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1971

No. 71-1538

D. C. Docket No. 71-52-JE-Civ

JOSE MIGUEL GARCIA-GUILLERN,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that petitioner-appellant pay to respondent-appellee, the costs on appeal to be taxed by the Clerk of this Court.

November 4, 1971

Issued As Mandate:

APPENDIX H.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1538

JOSE MIGUEL GARCIA-GUILLERN,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

(November 29, 1971)

ON PETITION FOR REHEARING

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.